EDITOR'S NOTE

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT B. EUBANK, PETITIONER
INDIVIDUALLY AND ON BEHALF OF
ALL OTHER SHAREHOLDERS OF
LEE LUMBER COMPANY, LTD.,

VS.

LEE LUMBER COMPANY, LTD.,

Respondent

VS.

INTERNATIONAL PAPER COMPANY,

Respondent

ON WRIT OF CERTIORARI TO
THE UNTIED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENT INTERNATIONAL PAPER COMPANY'S MOTION FOR SANCTIONS OR DAMAGES

Petitioner opposes the motion of Respondent International Paper Company ("International") for sanctions and/or damages. International's motion is under this Court's Rule 49.2:

> "When an appeal or petition for Writ of Certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

Petitioner opposes the motion on the following grounds:

1. Petitioner's Position Is Correct At Law. Petitioner contends that

> (a) a judgment holding a prior suit to state one cause of action ("nullity or rescission") and dismissing it solely for prescription of that cause of action, to quiet title (or any other action that might lie, other than "nullity or rescission"); and
>
> (b) the right of a party to a lease (or any contract) to contest its validity does not prescribe, so long as the lease (or any other contract) remains executory and the other party continues to claim performance under it.

To Petitioner's knowledge, these propositions are unquestioned - even in the litigation below, which avoided addressing them. The opinion in the litigation held to be res judicata be-

low (Lee II, Appendix B to the Petition for Certiorari) specifically and repeatedly held the cause of action stated to be "the action of nullity or rescission," even though at the time the plaintiff company attempted to assert the action to quiet title. The judgment is not therefore res judicata to a present action to quiet title, since the causes of action are different. Petition, pp. 13-14. The lease Petitioner seeks to cancel below does not expire until 2006, and International is currently on the lands and disturbing the title of the owner (Lee Lumber Company) ("Lee"). Accordingly the action to quiet title has not prescribed.

So obvious are the propositions, that upon International's motions for sanctions below attorneys and professors of law not interested in the case signed affidavits (Appendix E to the Petition) that they were valid law, that Petitioner's position was correct and should prevail. Though these affidavits were first filed of record in March, 1985, International has yet to file opposing affidavits.

International, in its motion and Brief in Opposition to the Petition, denies neither point of law - contenting itself, rather, to repeatedly bemoaning the extent of prior litigation over the lease. Well, there has been no litigation at all - only three unpublished summary-judgment dismissals for prescription of the "action of nullity or rescission," affirmed unpublished and without opinion under a rule allowing such affirmances when the dispositive issue was the findings of fact at trial ... ? On a summary judgment, when no findings of fact are made?

Regardless of the success or lack of success of Petitioner's position below, and regardless of whether this Court will undertake to grant certiorari and do something about the holdings below, clearly Petitioner's position is correct, not frivolous, and not sanctionable.

2. Petitioner's Position on the Question of Sanctions Is Correct at Law. International moved for sanctions below, and Petitioner responded with (1) a motion for a hearing and (2) the affidavits, referred to above, of attorneys and professors of law

that Petitioner's position was correct. The request for a hearing was denied, and the affidavits ignored. In an unpublished opinion, the Court of Appeals held only one of three prior judgments asserted to be res judicata - Lee II, the opinion in which itself repeatedly stated that it brought a cause of action ("nullity or rescission") different than the present one ("action to quiet title"). The Court of Appeals also granted International's motion for attorney's fees, to the extent of $2,500.00.

Clearly Petitioner has a meritorious, not frivolous, argument that he was denied due process below. Both the request for a hearing, and the affidavits filed to establish a record in lieu of a hearing, were utterly ignored.

3. This Case Is an Inappropriate Vehicle to Begin Awarding Sanctions Under Rule 49.2. Petitioner is of the private opinion that probably a number of petitions for certiorari are frivolous and sanctionable, and further that this Court should probably from time to time impose sanctions under the Rule.

However, imposition of sanctions will draw considerable attention from the bar, the community of legal scholars, and the public.

It would be far better to impose sanctions in a case in which the position of a petitioner were incorrect, rather than (as here) correct. Almost any attorney, or professor of law, or even layman reviewing this case (should sanctions be imposed) would conclude that the courts were wrong, and Petitioner was correct. And perhaps further, that the courts were determined to use sanctions to discourage arguments found disagreeable for undisclosed reasons, where the law itself would not discourage (or would even encourage) then. The impression given would be unseemly - more like the sort of justice expected from a harried policeman at a riot, than from a court of law.

* * *

Beyond the above, Petitioner urges the Court again to grant certiorari. In a series of three unpublished District Court opinions, affirmed twice unpublished and without opinion (in contravention of the Court of Appeals' own rules) and once with un-

published opinion awarding sanctions, the courts below have held that a lessor cannot challenge a lease that doesn't expire until 2006. All this in face of a case (L. L. Brewton Lumber Co.. Petition, p. 5-6) directly in point, cancelling just such a lease for just the grounds now urged.

The length of the (non-)litigation has aggravated Petitioner far more than International. Yet Petitioner, as an attorney, has "played the game" - patiently continuing to file motions, attend hearings, file briefs, appeals, briefs, petitions, etc. for some 13 years. The end result is, that the actions of the courts below have surpassed error to enter absurdity - as virtually any clerk or Justice reading this knows.

Petitioner is an unimportant individual, and not a member of any group or class of any importance other than that of litigants per se. But the question, whether a cause almost any observer knows to be correct can be shunted along through thirteen years of unpublished opinions and (illegal) non-opinions until it results in sanctions, is an important one. This could happen to anyone - it is not only Petitioner for whom the bell tolls.

For the above reasons, Petitioner submits that the Court should deny International's motion for sanctions and grant certiorari in the captioned case.

June 9, 1986.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing, by placing the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required to be served have been served.

Robert B. Eubank